may not be used to support discounts to schools and libraries to cover inside wiring and internal connections.[55]

B. The Joint Board's Improper Inclusion of Internal Connections Results in Excessive Funding Requirements and Should Be Reversed

The record suggests that the improper addition of internal connections to be funded by the universal service support mechanisms involving schools and libraries substantially increases the amount of the fund. As discussed in Section II.A. above, excessively large funds to support universal service will adversely affect competition in the telecommunications marketplace generally, the ability of the wireless industry to compete, the ability of the wireless industry to continue to serve as an alternative to certain fixed landline services, and the welfare of consumers. The more the Commission increases the amounts to be paid by the universal service funds to support schools and libraries, as well as in furtherance of other universal service goals, the more pronounced will be the adverse effects stemming from that action.

In order to meet the statutory goals with a more reasonably priced fund, the Commission needs to revisit the nature of the services to be provided to schools and libraries as well as the discount schedule. The Commission should strive to ensure that schools and libraries have access to needed telecommunications services, without expanding the money pool beyond its limit. In connection with that effort, PCIA suggests that the Commission

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[55] To the extent the Joint Board is worried about competitive concerns resulting from the use of different technologies, *see Joint Board Recommendation*, ¶ 482, there are far more direct and more effective ways to address that concern without distorting the language of the statute or Commission precedent.

reduce the cap on annual expenditures in support of the schools and libraries provisions. The Joint Board's and the Commission's goals may be laudable with respect to the schools and libraries, but that does not outweigh the potential danger of undermining the competitive telecommunications marketplace that now exists and forcing more and more subscribers to cancel their telecommunications service as rates continue to climb in order to meet the universal service funding requirements.[56]

IV. ELIGIBILITY TO RECEIVE UNIVERSAL SERVICE SUPPORT FUNDS SHOULD BE APPLIED IN A TECHNOLOGICALLY NEUTRAL MANNER

The *Joint Board Recommendation* reflects a concerted effort to ensure that any requirements defining the ability of any entity to receive universal service support funds are designed so as not to exclude parties on the basis merely of technology. PCIA endorses the Joint Board's efforts in this regard, because they reflect an acknowledgement that the telecommunications marketplace is rapidly changing, along with a recognition of the rapid development of technology. Clearly, it is in the best interests of the public as well as the goal of minimization of the universal service fund levels to ensure that technologies and carriers that ultimately may be more cost-effective have an opportunity to meet the universal service needs of segments of this country at the appropriate time. PCIA accordingly urges

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[56] The Commission must take a similar, conservative approach in addressing the telecommunications needs of rural health care providers. At this time, the Joint Board has recommended that the Commission obtain additional information on the telecommunications services needed by rural health care providers and the costs of such services. *Joint Board Recommendation*, ¶ 632. The Commission must exercise care so as not to provide support for an ideal rural health care telecommunications standard at funding levels that cannot be reasonably supported by the telecommunications industry and the public. Implementation of a carefully defined fund for supporting the telecommunications needs for rural health care providers can be accomplished consistent with the statutory goals.

the Commission to endorse the technological and competitive neutrality reflected in the Joint Board's proposals.

In this regard, PCIA urges the Commission to take an additional step to promote competition as well as technology-neutral opportunities for telecommunications carriers to serve the public pursuant to the universal service standards. Specifically, PCIA urges the Commission to define universal service areas as much smaller regions than those proposed by the Joint Board.

Section 214(e)(5) defines "service area" as:

> [A] geographic area established by a State commission for the purpose of determining universal service area obligations and support mechanisms. In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.[57]

The Joint Board recommends that "the Commission urge the states to designate service areas . . . that are of sufficiently small geographic scope to permit efficient targeting of high cost support and to facilitate entry by competing carriers."[58] This recommendation was based in part on the fact that unreasonably large service areas unfairly favored incumbent service providers. Specifically, the Joint Board posited that new entrants are less likely to be able to muster the greater startup costs necessary to initiate service to large areas than they are the lesser costs required to serve small areas.[59] Further, the Joint Board pointed out that

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[57] 47 U.S.C. § 214(e)(5).

[58] *Joint Board Recommendation*, ¶ 175.

[59] *Id.*

simply overlaying universal service areas over incumbent landline service areas would unfairly discriminate against wireless providers, who utilize different service areas.[60]

PCIA agrees with the Joint Board's recommendation that service areas should not be unreasonably large, and with its pro-competitive rationale for making this recommendation. As pointed out by the Joint Board, smaller service areas will encourage a greater number of carriers to compete for the opportunity to provide service to rural, insular, high cost, and low income areas. Such increased competition will provide the people living in these areas with a greater choice of high quality, low priced services, consistent with Section 254(b)(1)'s goal of providing all Americans with "quality services" at "just, reasonable, and affordable rates." Further, among these new competitors should be a number of wireless providers that might be able to serve rural and sparsely populated areas more economically than wireline carriers due to the lesser cost of wireless infrastructure under such circumstances.

Despite articulating these benefits for small service areas, the Joint Board nonetheless recommends that "the Commission retain the current study areas of rural telephone companies as the service areas for such companies."[61] The effect of adopting this recommendation is to consign the subscribers of many rural telephone companies to receiving the same telephone service from their existing supplier for years into the future. While actual exchange areas may be much smaller, existing study areas for rural telephone companies may be very large. Retaining the study areas as the basis for designating universal service providers could effectively foreclose entry by new telecommunications

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[60] *Id.*

[61] *Id.*, ¶ 172.

providers, such as wireless carriers. The Joint Board provides a competitive preference to rural telephone companies that is neither needed nor justified.

PCIA accordingly urges the Commission to emphatically recommend that the states adopt service areas for the purpose of meeting universal service goals based on census blocks, whether within a rural telephone company's service area or not. Use of census blocks will promote the broadest opportunities for diverse carriers to participate as universal service fund recipients for the very reasons suggested by the Joint Board itself. Indeed, there seems to be no compelling reason why the benefits identified by the Joint Board for small service areas in non-rural telephone company areas are not equally applicable to rural telephone company areas.

Finally, PCIA concurs with the Joint Board's conclusion that smaller service areas will promote a more narrowly targeted, and therefore a smaller universal service fund.[62] As pointed out by Sprint earlier in this proceeding, the larger a service area, the more likely that cost averaging will occur, and low cost areas within the large service area will unfairly and unnecessarily receive subsidies.[63] Thus, by encouraging states to establish smaller service areas, the Commission can reduce the size of the universal service fund while not reducing its effectiveness.

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[62] *Id.*

[63] Sprint Reply Comments, CC Docket No. 96-45 at 13 (filed May 7, 1996).

V. THE COMMISSION MUST CAREFULLY DESIGN THE CONTRIBUTION REQUIREMENTS TO BE IMPOSED ON TELECOMMUNICATIONS CARRIERS

As described above in these comments, the current design of the universal service support mechanism could result in the imposition of substantial payment obligations upon telecommunications carriers, with serious harm for the public interest. Even if, however, the Commission reduces the universal service fund consistent with the policies outlined in this pleading, the Commission must take care in designing its funding rules in order to comply with the statutory mandates as well as otherwise protecting the public interest.

It is essential that the Commission adopt a funding mechanism that fully accounts for competitive considerations. One factor to be included in the calculus should be some comparison in payment amounts between direct competitors, especially where payments made by one set of competitors might be used to support the activities of a direct competitor. Consideration of such factors is fully consistent with the statutory provisions of Section 254(d), which directs telecommunications carriers to contribute to the universal service fund on an "equitable and nondiscriminatory basis."[64]

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[64] 47 U.S.C. § 254(d).

VI. UNIVERSAL SERVICE SUPPORT FUNDS SHOULD BE COLLECTED BY MEANS OF A DIRECT LINE ITEM ON THE BILLS RENDERED BY TELECOMMUNICATIONS CARRIERS TO THEIR SUBSCRIBERS

The Joint Board found that telecommunications carriers should not recover their contributions to the universal service fund through the subscriber line charge or from retail end user surcharges. The Joint Board expressed its belief that Section 254 requires that contributions be made by telecommunications carriers, not customers.[65] This is an improper interpretation. Rather, the Act does *not* prohibit carriers from recovering the costs of their contributions to the fund from end users. In fact, such recovery of costs is consistent with the public interest and the objectives of the universal service program.

Section 254 states that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."[66] The 1996 Act is silent with respect to whether carriers may pass those costs through to end users. Absent any prohibition upon end user surcharges in the 1996 Act, the Commission should permit carriers to recover their costs from end users where such recovery is consistent with the public interest.

The recovery of carriers' contributions to the fund from end users is consistent with the goals of the universal service program. The universal service program benefits all end users, by enabling them to reach -- and to be reached by -- customers who otherwise would not have access to the "core" services designated by the Joint Board. Allowing the costs of

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[65] *Joint Board Recommendation, ¶ 812.*

[66] 47 U.S.C. § 254(b)(4).

universal service to be passed along to these beneficiaries of the program is appropriate.[67] Indeed, as Commissioner Chong aptly stated in her separate statement, "It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace."[68] Thus, a pass through of contribution costs to end users is clearly envisioned.

Permitting carriers to recover their contributions to the universal service fund from end users also is consistent with the public interest. Congress and the Commission have determined that an increase in the number of market participants and increased competition foster the public interest. However, market entry and participation would be discouraged if carriers are inhibited from recovering fully the costs of conducting their business. At the same time, competitive market forces will prevent carriers from overpricing their services to end users. Ultimately, this is an area where the Joint Board should let the marketplace decide, and not place regulatory prohibitions on subscriber surcharges.[69]

Moreover, allowing the costs of universal service to be passed through to end users would correct the inequality between wholesale and retail service providers that exists in the current formulation. The *Joint Board Recommendation* contemplates in some instances that a

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[67] While carriers contributing to the fund could recover these costs from end users, carriers recovering subsidies from the fund presumably would pass along those savings to end users in the form of reduced rates which reflect the amount of the subsidies received.

[68] *Joint Board Recommendation,* Separate Statement of Commissioner Chong at 10.

[69] Assuming that the Commission eliminates the prohibition on retail end user surcharges, a mechanism must be adopted to prevent carriers from having to count revenues earned from the pass through as part of total revenues that are subject to the contribution formula. Otherwise, carriers will be paying a "tax upon a tax."

wholesaler can pass the costs of universal service onto another carrier.[70] This will result in having the burden of the universal fund trickle down to the last carrier who has the direct subscriber relationship. If this carrier cannot pass the charge on to the end user, a competitive disparity between the wholesaler and retailer is created. It is difficult to imagine how competition at the retail level will be fostered by such a result.[71]

PCIA further believes that the public will best understand the effects of the universal service policies adopted by Congress and implemented by the Commission through knowing each month the amount of funds required to support such efforts. Accordingly, contrary to the Joint Board's position,[72] PCIA believes that an explicit charge should be reflected each month on the telecommunications bills received by consumers and businesses alike. Indeed, a separate line item on each telecommunications service bill appears to be most consistent with the goal expressed by Congress that "all universal service support should be clearly identified . . . ."[73] By knowing the exact financial effect on them, and understanding what activities those funds are being used to support, members of the public can make a determination whether the program is appropriate, needs expansion or contraction, or should

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[70] *Joint Board Recommendation*, ¶ 108.

[71] This disparity also raises Equal Protection concerns. The Equal Protection clause prohibits the government from "treating differently persons who are in all relevant respects alike." *Nordinger v. Hahn*, 505 U.S. 1 (1992). However, the proposed funding mechanism precludes the recovery of contributions from end users, and would require solely the carrier with the direct subscriber relationship to bear the costs of universal service. The Joint Board has not articulated any basis upon which to treat retail service providers differently from wholesale service providers. Absent any such reason, the Equal Protection clause prohibits the currently proposed distinction between these two types of service providers.

[72] *See Joint Board Recommendation*, ¶ 812.

[73] Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 104-458, at 131 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 143.

be funded through some other mechanism. Having an informed electorate on this issue certainly seems to be fully consistent with the public interest.

The Joint Board opposes the adoption of a retail end user surcharge, yet states that "carriers are permitted under section 254 to pass through to users of unbundled elements an equitable and nondiscriminatory portion of their universal service obligation."[74] Thus, according to the Joint Board, it is acceptable to bundle in the universal service charges with service rates but not set the charges out separately on bills.[75] This approach runs contrary to the philosophy embodied in the 1996 Act as well as many recent Commission decisions. Moreover, bundling the universal service charges in with the rates for service would appear to affect marketplace pricing without an accurate basis for so doing. Separating the charges for supporting the universal service support mechanisms from actual service rates would appear to be less distortive of the marketplace.

The public interest as well as the statutory goals of the 1996 Act thus would be best served by including universal service support payments as a separate line item on the bills for all telecommunications subscribers.

VII. CMRS PROVIDERS SHOULD BE REQUIRED TO CONTRIBUTE ONLY TO THE FEDERAL UNIVERSAL SERVICE FUND

PCIA has previously demonstrated that CMRS is primarily an interstate service, both legally and factually, and thus should be required to contribute only to the interstate universal

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[74] *Joint Board Recommendation*, ¶ 808.

[75] The Joint Board asserts that Section 254 does not permit the imposition of direct end user charges, but it is unclear to PCIA what language in the statute forms the basis for the Joint Board's conclusion. *See id.*, ¶ 808.

service fund. The Joint Board ignores the plain language of Section 332(c)(3) to reach its contrary conclusion that this section "does not preclude states from requiring CMRS providers to contribute to state support mechanisms."[76] This conclusion is not only inconsistent with the statutory terms but also ignores applicable precedent.

Legally, by adding Section 332(c) to the Communications Act of 1934, Congress federalized the treatment of CMRS. Congressional intent to place CMRS within the ambit of federal regulators is confirmed by the statute's legislative history, which states that the purpose of Section 332(c) "is to establish a Federal regulatory framework governing the offering of all commercial mobile service."[77]

Moreover, in language apparently ignored by the Joint Board, Section 332(c) explicitly addresses the obligations of CMRS licensees to pay into state universal service programs:

> Nothing in this paragraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[78]

Under this provision, CMRS providers may be subject to state universal service funding obligations only at such time as they become a substantial substitute for landline telephone services throughout a state. That clearly is not the case in any state at present. Indeed, a Connecticut state court has agreed that the statute is quite clear that CMRS providers cannot

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[76] *Id.*, ¶ 791.

[77] H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993).

[78] 47 U.S.C. § 332(c)(1)(B).

be required to pay into a state universal service fund until they meet test the test quoted above.[79]

Further, the factual nature of CMRS makes it an inherently interstate service. As stated in the House Report accompanying Section 332(c), "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[80] Moreover, it is appropriate to treat CMRS as wholly interstate under the inseverability doctrine. There are a number of economic and technical reasons why the interstate and intrastate portions of CMRS regulatory treatment cannot be severed, as PCIA has repeatedly demonstrated to the Commission.

Accordingly, the Commission should reject the conclusion reached by the Joint Board and require CMRS licensees to contribute only to the federal, interstate universal service support fund.

VIII. CONCLUSION

The Joint Board has provided the Commission with a useful starting place in implementing the provisions of Section 254 of the 1996 Act. PCIA urges the Commission to adopt a number of provisions contained in the Joint Board recommendations intended to carefully define the total amount of the universal service fund. At the same time, certain of the Joint Board proposals would result in excessive funding levels and inequitable treatment of competitors. In those situations, PCIA urges the Commission to reject the Joint Board

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[79] *Metro Mobile of Fairfield County, Inc. et al. v. Connecticut Department of Public Utility Control*, No. CV-95-00512758, slip op. at 7-8 (Connecticut Superior Court Judicial District of Hartford-New Britain Dec. 5, 1996).

[80] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993).

proposals and instead implement steps consistent with PCIA's comments as outlined above. Defining universal service objectives and obligations as recommended in these comments will best further the public interest.

Respectfully submitted,

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December 19, 1996

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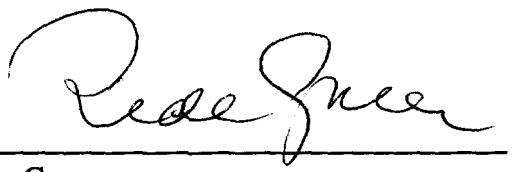

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